

**PUBLIC VERSION**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division**

UNITED STATES OF AMERICA,

Plaintiff,

v.

ZACKARY ELLIS SANDERS,

Defendant.

Case No. 1:20-cr-00143  
The Honorable Judge Ellis  
Next Hearing Date: None Scheduled

**RESPONSE TO GOVERNMENT'S SUPPLEMENTAL  
BRIEF ON DEFENDANT'S MOTION TO COMPEL DISCOVERY**

Zackary Ellis Sanders, by and through undersigned counsel, respectfully submits this Response to the Government's Supplemental Brief in order for the Court to rule on a clear record based on the additional information the Government set forth about the [REDACTED]

[REDACTED]. First, regarding the [REDACTED] issue, the Government continues to state incorrectly that [REDACTED] was an accurate description of [REDACTED] when it was not: there is no document or combination of documents from the [REDACTED] that the defense has received that includes

[REDACTED]<sup>1</sup> See Defense Brief at 2-7, 9-10; Reply to Gov't Opp'n at 3-4. Nor does the Government ever inform the Court what the Special Agent actually understood at the time [REDACTED]—and whether it contradicts what the defense has stated—despite [REDACTED]

[REDACTED]. Second, regarding the [REDACTED] issue, the Government has presented an

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<sup>1</sup> The Special Agent (and Government) also failed to [REDACTED] [REDACTED]. See Mot. to Compel at 16-17, Reply to Gov't Opp'n at 2-4, Defense Brief at 2-7, 9.

implausible theory about how the [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED].

**I. Respectfully, the Government has repeatedly misrepresented to the Court that [REDACTED] is an accurate description of what the [REDACTED] told the FBI—it is not.**

Contrary to what the Government has repeatedly represented to the Court, none of the three one-page documents that the Government claims [REDACTED]

[REDACTED]. None of the three documents state that [REDACTED]

[REDACTED]  
[REDACTED]. See Comparison

of [REDACTED] and Government Statements, attached to Mr. Sander's Brief ("Defense Brief") as Ex. 2; Cf. [REDACTED]

[REDACTED] documents provide no way for the Court to assess the Special Agent's state of mind at the time [REDACTED].

In the Government's Supplemental Brief ("Gov't Brief"), the Government, again, incorrectly asserts that [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]. None of the three one-page NCA documents, even taken together, convey that proposition. The Special Agent, and the

Government in this litigation, have repeatedly added language and embellished [REDACTED] [REDACTED], see Comparison of [REDACTED] and Government Statements, attached to Defense Brief as Ex. 2, because a verbatim quote from the [REDACTED] and what the [REDACTED] actually meant would never have been enough for probable cause. See Defense Brief at 2-7, 9-10; Reply to Gov't Opp'n at 3-4.

The Government clearly has no evidence to support the purported facts [REDACTED] [REDACTED] —which did not come from the [REDACTED]—because if they had any such evidence, it would have said so. The Special Agent would have said so [REDACTED] [REDACTED]. Instead, the Special Agent does not address the [REDACTED] issue in [REDACTED] at all, presumably because he cannot consistent with the Government's duty of candor to the Court. The Special Agent's silence on that issue is deafening. Furthermore, while what the FBI learned during the execution of the search warrant is irrelevant to the Special Agent's state of mind in seeking the warrant, [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]. Indeed, it appears that in including this information the Government is impliedly conceding that there was no evidence that [REDACTED]

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<sup>2</sup> The only document that [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]. The Government failed to acknowledge any of this information to the Court. Defense Brief at 5.

**II. The Government has presented an implausible, hypothetical, after-the-fact theory about how the [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].**

The Government has, after-the-fact, claimed that it *could theoretically* be possible for the [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]. The Government does not claim that is actually possible in practice or that that is what happened here. Nowhere does the Government state what the NCA actually did.

The Government's new theory [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]. According to the Tor Project, “[t]oday, the network has thousands of relays run by volunteers and millions of users worldwide. And it is this diversity that keeps Tor users safe.” Tor Project, *About: History*, <https://www.torproject.org/about/history/> (last accessed Aug. 11, 2020).

The Special Agent appears to have [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] other

FBI agents, including in this very District, who stated that they were not aware of any other technique—other than a Network Investigative Technique (NIT) that interferes with computers, wherever they are located, to search and seize their IP address information—for de-anonymizing Internet users on the Tor network. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Dr. Matthew Miller reviewed the Government's Supplemental Brief, including [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] .

The Tor Project actually describes solutions built into the Tor Browser [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]. While the Tor Project warns that an Internet user could be de-anonymized in two ways on Tor, the Tor Project responds that Tor Browser is specifically designed to prevent these two ways people could be de-anonymized. *See* Tor Project, *General FAQ*, <https://2019.www.torproject.org/docs/faq.html.en#AmITotallyAnonymous> (last accessed Aug. 11, 2020) (“That’s where Tor Browser comes in. We produce a web browser that is preconfigured to help you control the risks to your privacy and anonymity while browsing the Internet. Not only are the above technologies disabled to prevent identity leaks, Tor Browser also includes browser extensions like NoScript and Torbutton, as well as patches to the Firefox source code”).

The Tor Project noted six years ago in 2014 that “[i]n theory it may be possible to track Tor users by linking up their entry and exit points on the network but it is generally *very difficult to do so*. The Tor network design, however, does not protect against a targeted attack by a global passive adversary (such as the NSA) intent on figuring out whom to investigate through watching and measuring Tor traffic going into and out of the network and correlating the information on

both sides.” Quick Summary of recent traffic correlation using netflows (Nov. 24, 2014), <https://blog.torproject.org/quick-summary-recent-traffic-correlation-using-netflows?page=1> (last accessed Aug. 11, 2020). However, this blog post from almost six years ago is contradicted by the Tor Project’s much more recent assertion, *see supra*, that the diversity of the Tor network keeps users safe *today*. Furthermore, [REDACTED]

[REDACTED]

[REDACTED].

## CONCLUSION

In his Motion to Compel, Reply, and Supplemental Brief, Mr. Sanders has shown that, contrary to the Government’s repeated representations to this Court, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

Accordingly, for the reasons stated above and in previous filings, and for any other reasons apparent to the Court, Mr. Sanders respectfully requests that this Court order the Government to provide communications and other documents pertaining to [REDACTED]

[REDACTED]

[REDACTED] Mot. to Compel at 10.

Respectfully submitted,

/s/ Jonathan Jeffress

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 12<sup>th</sup> day of August, 2020, the foregoing was served electronically on the counsel of record through the U.S. District Court for the Eastern District of Virginia Electronic Document Filing System (ECF) and the document is available on the ECF system.

*/s/ Emily Voshell*  
Emily Voshell